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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE AMEZQUA, et al,

Defendants and Appellants.

2d Crim. No. B246954  
(Super. Ct. No. BA396593)  
(Los Angeles County)

Enrique Amezqua (Enrique) and Edgar Amezqua (Edgar) appeal from the judgment entered after a jury convicted them of felony assault upon Isidro Solis by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4).) The jury found true an allegation that Edgar had personally used a deadly weapon (a tire iron). (*Id.*, § 12022, subd. (b)(1).) The jury also convicted Enrique of misdemeanor assault upon Filemon Ceja. (*Id.*, § 240.) For the felony assault the trial court sentenced Enrique to prison for three years, suspended execution of the sentence, and placed him on formal probation on condition that he serve 365 days in county jail. For the misdemeanor assault the court sentenced Enrique to a concurrent 180-day county jail term. As to Edgar, the court imposed a four-year prison sentence, suspended its execution, and placed him on formal probation on condition that he serve 365 days in county jail.

Enrique contends that the trial court erroneously admitted an emergency department medical record showing that, shortly after the assault, he was diagnosed with alcohol and marijuana intoxication. Edgar contends that the prosecutor committed misconduct during closing argument. We affirm.

### *Facts*

#### *Prosecution Evidence*

Enrique and Leticia Ceja (Leticia) had a dating relationship. On April 15, 2012, Enrique and Leticia argued during a telephone conversation. Enrique told Leticia that he was "on his way" over to her house and wanted his "stuff back today." Enrique's "stuff" included an engagement ring.

Shortly after the conversation, Leticia saw Edgar's car parked near her house. Enrique and Edgar are brothers. Edgar and Carlos Guerrero were inside the car. Enrique was standing by the house of Leticia's neighbor. Leticia walked to Enrique and "gave him his stuff back." She observed that he was "drunk" and "had a beer can [in] his hand."

Enrique walked to Edgar's car and entered it. Edgar was the driver. The occupants of the car "started screaming" at Leticia's brother, Isidro Solis, who was walking across the street. The car "started speeding . . . towards" Solis, who "jump[ed] back" to avoid being struck. Enrique stuck "half of his body . . . out of the car," poured beer on Solis, and threw the beer can at him but missed.

Enrique and Solis began "punching each other." Enrique was still inside the car with "half of his body out [of] the car." Solis hit Enrique with the "stick" part of a car jack. The car drove away, and Solis threw the stick at its front windshield.

A few minutes later, the car returned to the scene. Appellants and Carlos Guerrero got out of the car, ran toward Solis, and "started hitting" him. Leticia's father, Filemon Ceja (Filemon), tried to break up the fight by pulling Enrique away from Solis. Filemon slipped and fell to the ground. Enrique "went on top of him" and started punching him. Edgar ran to the car and returned with a tire iron. He hit Solis in the head with the tire iron. When Solis was hit, he "was trying to take Enrique off [of Filemon]."

Appellants ran toward the car and yelled that they were going to come back and kill Solis. Appellants and Carlos Guerrero entered the car and drove away.

### *Defense Evidence*

Enrique did not testify. On direct examination, Edgar testified as follows: On the way to Leticia's house, Enrique appeared to be "normal, like a regular day." Edgar stopped his car in front of Leticia's house when he heard "a really loud . . . sound." Enrique got out of the car and walked toward Solis. They started punching each other. Solis had a crowbar in his hands. He used the crowbar to smash the front windshield of Edgar's car. Edgar did not try to run over Solis and did not see Enrique throw a beer can at Solis or pour beer on him.

To "defend" himself and his brother, Edgar retrieved a tire iron from the trunk of his car. He did not hit anyone with the tire iron. He helped Enrique get up from the ground and escorted him back to the car. They entered the car and drove away.

Edgar noticed that Enrique was injured. He drove to his cousin's house for help. Someone called the paramedics, who took Enrique away in an ambulance. Edgar stayed behind at his cousin's house.

On cross-examination, Edgar testified that neither he nor his brother had drunk alcohol or smoked marijuana before the incident outside Leticia's house. Edgar also testified that he remembered telling a detective that he had "struck [Solis] on the back of the head with the tire iron because [he was] protecting [his] brother." Immediately after this testimony, Edgar backtracked and said that he had not told the detective that he had hit Solis.

### *Rebuttal*

Detective Dante Palacio interviewed Edgar after his arrest. Edgar said that he had used a tire iron against Solis after Solis hit Enrique on the head with a tire iron. Edgar also said that before the incident outside Leticia's house, "Enrique [had] stopped to buy some beer at a liquor store."

*Admission of Enrique's Emergency Department Medical Record*

Enrique contends that the trial court erroneously admitted his Los Angeles County USC Medical Center Emergency Department medical record (People's Exhibit 18), which was prepared shortly after the assault. Under the heading "Discharge Diagnoses," the record shows that Enrique was diagnosed with "alcohol intoxication" and "marijuana intoxication." Outside the presence of the jury, the trial court noted that another medical record, "the Los Angeles County/USC Medical Center History," stated that Enrique "drank six beers [and] smoked marijuana." In their brief, the People correctly point out that this other record "was *not* made part of People's Exhibit 18" and was not admitted into evidence.

Enrique's counsel joined in the objection of Edgar's counsel that the handwritten "Discharge Diagnoses" of alcohol intoxication and marijuana intoxication were without "foundation . . . because we don't know who wrote it, who made that determination." Enrique's counsel separately objected that the diagnoses were inadmissible hearsay.

The trial court overruled the objections. It concluded that the diagnoses were admissible under the business record exception to the hearsay rule. (Evid. Code, § 1271.) The exception provides that, if certain requirements are met, "[e]vidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event." (*Ibid.*) The requirements are "(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (*Ibid.*)

"[A] trial court has broad discretion to determine whether a party has established the foundational requirements for a hearsay exception [citation] and '[a] ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto[.]' [Citation.] We review the trial court's conclusions regarding foundational facts for substantial evidence. [Citation.] We review the trial court's ultimate ruling for an

abuse of discretion [citations], reversing only if "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citation.]' (*People v. DeHoyos* (2013) 57 Cal.4th 79, 132.)

Enrique's medical record was accompanied by an affidavit from the custodian of records declaring that it was "prepared by personnel of the Hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition or event . . . ." Enrique contends that the medical record was inadmissible because "no witness testified to the identity of the documents or their mode of preparation, and the affidavit cannot substitute for such testimony." This contention is forfeited for two reasons. First, in the trial court Enrique did not object that the affidavit was insufficient because the prosecutor must present live, in-court testimony from the custodian of records. (Evid. Code, § 353, subd. (a).) Second, the contention is not supported by meaningful legal argument with citation to authorities. (Cal. Rules of Court, rule 8.204(a)(1)(A); *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

In any event, the contention is without merit. In 1996 Evidence Code section 1561 was amended " 'to ensure that such [nonparty business] records may continue to be admissible without requiring their authenticity to be proved through live testimony from the custodian of records or other qualified witness.' (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 3001 (1995–1996 Reg. Sess.) May 16, 1996, p. 1.)" (*Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039, 1045, brackets in original.)

*People v. Reyes* (1974) 12 Cal.3d 486, is instructive on whether the admission of Enrique's medical record was an abuse of discretion. In *Reyes* the defendant argued that the trial court had erred in excluding a psychiatrist's diagnosis that the victim suffered from " '[a]lcoholism with sexual psychopathy.' " (*Id.*, at p. 502.) The "diagnosis was contained in a psychiatric report which [defendant] contend[ed] was admissible as a hospital business record under Evidence Code section 1271." (*Ibid.*) Our Supreme Court concluded that the trial court had properly excluded the psychiatrist's diagnosis. It

reasoned: "The psychiatrist's opinion that the victim suffered from a sexual psychopathology was merely an opinion, not an act, condition or event within the meaning of the statute. . . . ' "It is true that some diagnoses are a statement of a fact or condition, for example, a diagnosis that a man has suffered a compound fracture of the femur is a record of what the person making the diagnosis has seen but this is not true where the diagnosis is but the reasoning of the person making it arrived at from the consideration of many different factors." ' [Citations.]" (*Id.*, at p. 503.)

Unlike the diagnosis in *Reyes*, the diagnosis that Enrique was in a state of alcohol intoxication was "a record of what the person making the diagnosis ha[d] seen" and heard. (*People v. Reyes, supra*, 12 Cal.3d at p. 503.) It did not involve the complex reasoning process of a psychiatric diagnosis of sexual psychopathy.

The court did not abuse its discretion in admitting the diagnosis of marijuana intoxication. When counsel for Edgar complained that the medical record did not indicate where the "information" of Enrique's alcohol and marijuana intoxication "came from," the court replied: "I'll tell you where it came from. It came from . . . [Enrique]. On the Los Angeles County/USC Medical Center History, it says 21-year-old male, drank six beers, smoked marijuana and was beaten on the head with [a] club. There was nobody else there [at the medical center besides Enrique] that would have known how many beers [Enrique] drank except for him." Thus, the trial court drew the inference from the medical center history that Enrique had told medical personnel that he had drunk beer and smoked marijuana. Enrique's counsel did not object to the trial court's statement. In view of the reasonableness of the inference, the lack of an objection by Enrique's counsel, and the admissibility of Enrique's statements under the admission exception to the hearsay rule (Evid. Code, § 1220), we cannot conclude that " ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner." ' " (*People v. DeHoyos, supra*, 57 Cal.4th at p. 132.)

Even if the trial court had erroneously admitted the diagnosis of marijuana intoxication, the error would not have " ' "resulted in a manifest miscarriage of

justice." ' ' " (*People v. DeHoyos, supra*, 57 Cal.4th at p. 132.) The "miscarriage of justice" test asks " 'whether defendant has established there exists a reasonable probability he would have obtained a more favorable result if the error had not occurred.' [Citation.]" (*People v. Montes* (2014) 58 Cal.4th 809, 876.) Enrique has failed to explain how the erroneous admission of the diagnosis of marijuana intoxication prejudiced him in view of the admissibility of the diagnosis of alcohol intoxication. What mattered was that Enrique was intoxicated, not whether the intoxication was due to marijuana or alcohol.

Enrique asserts that the admission of the diagnoses violated his federal constitutional right to confrontation. (U.S. Const., 6th & 14th Amends.) Therefore, Enrique argues, the People must prove that the error was harmless beyond a reasonable doubt. Enrique forfeited his confrontation clause claim because he failed to object on this ground in the trial court. (*People v. Hajek* (2014) 58 Cal.4th 1144, 1213-1214; *People v. Raley* (1992) 2 Cal.4th 870, 892 [defendant's hearsay objection did not preserve for appellate review claim that "the admission of this evidence violated his state and federal constitutional rights to due process and to confront the witnesses against him"].)

In any event, the admission of the diagnoses did not violate Enrique's constitutional right to confrontation. "[T]he confrontation clause is concerned *solely* with hearsay statements that are testimonial [citation] . . . ." (*People v. Cage* (2007) 40 Cal.4th 965, 981.) " ' "[T]estimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." [Citation.]' " (*People v. Edwards* (2013) 57 Cal.4th 658, 705.) There is no evidence that the primary purpose of recording the diagnoses in Enrique's emergency department medical record " 'pertain[ed] in some fashion to a criminal prosecution.' " (*Ibid.*) In 1975 the state legislature "[d]ecriminalized being under the influence of marijuana" in violation of Health and Safety Code section 11550. (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897.) Enrique was not charged with public intoxication in violation of section 647, subdivision (f).

### *Prosecutorial Misconduct*

Edgar contends that the prosecutor committed misconduct during closing argument when she "insinuated that [his] counsel had fabricated [his] defense and suborned perjury by Edgar." The prosecutor stated: "[W]hen [Edgar's] original statement [to the police] wasn't compelling, it wasn't what they needed to present a self-defense instruction, they had to put up . . . Edgar and Edgar had to say certain things in order to --" At this point, Edgar's counsel interjected, "I'm going to object, improperly characterizes." Counsel did not explain what was "improperly characterize[d]" or why this was so. The court overruled the objection. The prosecutor continued: "They had to put up Edgar to say what he needed to say to basically make . . . the argument of self-defense." "[W]hen . . . the evidence didn't support it [self-defense], they had to put Edgar up." Edgar maintains that "they" referred to his counsel and that the prosecutor's remarks were " 'uncalled for aspersions on defense counsel's character and integrity.' "

Edgar forfeited this argument because he did not make a proper objection in the trial court. "Generally, a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct. [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) In *People v. Fernandez* (2013) 216 Cal.App.4th 540, 560, the appellate court concluded that the defendant had "appropriately concede[d]" the forfeiture of his prosecutorial misconduct claim because he had objected only "on the vague ground of 'improper argument.' " The objection of Edgar's counsel that the prosecutor's remarks "improperly characterizes" was similarly vague.

Even if the issue had been preserved for appellate review, the prosecutor's remarks were not misconduct. Contrary to Edgar's claim, the prosecutor did not "insinuate[]" that [his] attorney had suborned perjury." The prosecutor reasonably inferred that, because the evidence presented in the People's case in chief was insufficient to show that Edgar had acted in self-defense, "they" [Edgar and his counsel] decided to present evidence of self-defense through Edgar's testimony. "A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including



reasonable inferences or deductions that may be drawn from the evidence. [Citation.]" (*People v. Ledesma, supra*, 39 Cal.4th at p. 726.)

Edgar contends that during closing argument the prosecutor also committed misconduct because he misstated the evidence. The misstatement occurred when the prosecutor told the jury that Edgar had testified that he "attempted to strike [Solis] in the back of the head." Edgar testified that, although he had retrieved a tire iron from the trunk of his car, he did not hit anyone with it. Edgar did not say whether he had attempted to strike Solis. He eventually "threw [the tire iron] or tossed it under the car" so that "no one could . . . get it or use it against us." When defense counsel objected that the prosecutor's argument "misstates the testimony," the court admonished the jury: "The jury will be the arbiter of what was said and what was not said and what the facts are in this case. The arguments of counsel . . . are not evidence." The court's admonition was sufficient to cure any prejudice resulting from the prosecutor's misstatement of Edgar's testimony.

*Disposition*

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Richard Kemalyan, Judge  
Superior Court County of Los Angeles

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